In the Supreme Court of the United States.

OCTOBER TERM, 1978.

No. 78-330

JANE HUNERWADEL, FOR HERSELF AND ALL OTHERS SIMILARLY SITUATED,
APPELLANT,

FRANCIS X. BELLOTTI, ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS; GARRETT BYRNE, DISTRICT ATTORNEY FOR THE COUNTY OF SUFFOLK; THE DISTRICT ATTORNEYS FOR ALL OTHER COUNTIES, THEIR AGENTS, SUCCESSORS, THOSE ACTING IN CONCERT WITH THEM, AND ALL OTHERS SIMILARLY SITUATED,
APPELLANTS,

v.

WILLIAM BAIRD; MARY MOE;
PARENTS AID SOCIETY, INC.;
GERALD ZUPNICK, M.D.;
AND ALL OTHERS SIMILARLY SITUATED,
APPELLEES,

PLANNED PARENTHOOD LEAGUE OF MASSACHUSETTS, CRITTENTON HASTINGS HOUSE & CLINIC AND PHILIP G. STUBBLEFIELD,
APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.

Jurisdictional Statement on Behalf of Defendant-Intervenor Jane Hunerwadel.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS.

Jurisdictional Statement on Behalf of Defendant-Intervenor Jane Hunerwadel.

This is an appeal from an order entered on May 2, 1978, by a three-judge District Court declaring unconstitutional a statute of the Commonwealth of Massachusetts which pro-

hibited physicians from performing abortions on unmarried, minor girls under the age of eighteen without parental consent or the consent of a judge of the Superior Court. The case raises substantially the same issues that were before the Court in *Bellotti* v. *Baird*, 428 U.S. 132 (1976). The appellant is Jane Hunerwadel, a parent, who intervened as a defendant on behalf of herself and all others similarly situated. This statement is submitted pursuant to Rule 13 of the Rules of the Supreme Court to demonstrate that the Court has jurisdiction to consider this appeal and that the questions presented are substantial.

Opinion Below.

The opinion of the District Court is reported at 450 F. Supp. 997 (D. Mass. 1978). The majority opinion of the District Court and the dissenting opinion of Senior District Judge Anthony J. Julian are set forth in the Appendix attached to the Jurisdictional Statement submitted by Attorney General Francis X. Bellotti in a separate appeal from the District Court order.[1] Copies of the order, the amended order and appellant's notice of appeal are attached hereto in the Appendix.

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[1]In lieu of filing a joint jurisdictional statement as provided under Supreme Court Rules 46 and 15(3), the appellant and Attorney General Francis X. Bellotti, the defendant below, have taken separate appeals. However, the appellant refers the Court to the Appendix attached to the Jurisdictional Statement submitted by the Attorney General in his appeal. The appellant's notice of appeal is set forth in the Appendix attached to this statement.

Jurisdiction.

This action for declaratory and injunctive relief was brought by the appellees under the provisions of 28 U.S.C. §§ 1331, 1343, 2201 and 42 U.S.C. § 1983. A three-judge court was convened pursuant to 28 U.S.C. §§ 2281, 2284.[2] The order of the District Court was entered on May 2, 1978. An amended order correcting inadvertencies in the original order was entered on June 20, 1978. The appellant filed her notice of appeal in the District Court on June 26, 1978. The jurisdiction of the Court to review this order is conferred by 28 U.S.C. § 1253. The following decisions sustain the jurisdiction of the Court to review the order of the District Court on direct appeal: *Bellotti* v. *Baird, supra*; *Roe* v. *Wade*, 410 U.S. 113 (1973); *Florida Lime and Avocado Growers, Inc.* v. *Jacobsen*, 362 U.S. 73 (1960).

Statutes Involved.

The District Court order declared § 12S of chapter 112 of the Massachusetts General Laws unconstitutional. The District Court also declared unconstitutional all other sections of chapter 112 insofar as they make specific reference to § 12S. These sections, which are set forth below together with § 12S, are §§ 12Q, 12T, and 12U.[3]

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[2]The repeal of 28 U.S.C. § 2281 and amendments to 28 U.S.C. § 2284 do not affect this appeal. See § 7 of Act of August 12, 1976, P.L. 94-381, 90 Stat. 1120, providing: "This Act [repeal of 28 U.S.C. § 2281 and amendments to 28 U.S.C. § 2284] shall not apply to any action commenced on or before the date of enactment [enacted August 12, 1976]." This action was initially commenced on October 21, 1974.

[3]These sections were added as part of comprehensive act to regulate abortion. See Mass. St. 1974, c. 706. These sections were renumbered by

§ 12Q. Except in an emergency requiring immediate action, no abortion may be performed under sections twelve L or twelve M unless the written informed consent of the proper person or persons has been delivered to the physician performing the abortion as set forth in section twelve S; and if the abortion is during or after the thirteenth week of pregnancy, it is performed in a hospital duly authorized to provide facilities for general surgery.

Except in an emergency requiring immediate action, no abortion may be performed under section twelve M unless performed in a hospital duly authorized to provide facilities for obstetrical services.

§ 12S. If the mother is less than eighteen years of age and has not married, the consent of both the mother and her parents is required. If one or both of the mother's parents refuse such consent, consent may be obtained by order of a judge of the superior court for good cause shown, after such hearing as he deems necessary. Such a hearing will not require the appointment of a guardian for the mother. If one of the parents has died or has deserted his or her family, consent by the remaining parent is sufficient. If both parents have died or have deserted their family, consent of the mother's guardian or other person having duties similar to a guardian, or any person who had assumed the care and custody of the mother is sufficient. The commissioner of public health shall prescribe a written form for such consent. Such form shall be signed by the proper person or persons and

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St. 1977, c. 377, with certain corrective changes but no change in the language. As a result, § 12N became 12Q, § 12P became 12S, § 12Q became 12T, and § 12R became 12U. For the sake of clarity all references will be to the statute as presently numbered.

given to the physician performing the abortion who shall maintain it in his permanent files.

Nothing in this section shall be construed as abolishing or limiting any common law rights of any other person or persons relative to consent to the performance of an abortion for purposes of any civil action or any injunctive relief under section twelve U.

§ 12T. Any person who commits an act in violation of sections twelve O or twelve P shall be punished by a fine of not less than five hundred dollars nor more than two thousand dollars, or by imprisonment of not less than three months nor more than five years, or by both said fine and imprisonment. Conduct which violates sections twelve O or twelve P which also violates any other criminal laws of the commonwealth, may be punished either under this section or under such other applicable criminal laws. Any person who willfully violates the provisions of sections twelve Q or twelve R shall be punished by a fine of not less than one hundred dollars nor more than two thousand dollars.

§ 12U. The attorney general or any person whose consent is required either pursuant to section twelve S or under common law, may petition the superior court for an order enjoining the performance of any abortion that may be performed contrary to the provisions of section twelve L to twelve T, inclusive.

Question Presented.

Whether Mass. G.L. c. 112, § 12S, prohibiting physicians from performing abortions on unmarried, minor girls under

the age of eighteen without parental consent or the consent of a judge of the Superior Court is unconstitutional on its face under the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

Statement of the Case.

This is a class action for declaratory relief. The plaintiffs are as follows: Mary Moe is a pregnant unmarried minor girl who, at the time this action was commenced, desired to have an abortion without informing her parents; Parents Aid Society (Parents Aid) is an abortion clinic; Gerald Zupnick, M.D., is a physician employed by Parents Aid to perform abortions and other related services; and William Baird is director and chief counselor for Parents Aid. In addition, Planned Parenthood League of Massachusetts, Crittenton Hastings House and Clinic and Phillip G. Stubblefield were allowed in as plaintiff-intervenors. The defendants are Francis X. Bellotti, Attorney General of the Commonwealth of Massachusetts and the District Attorneys for all counties in the Commonwealth. Jane Hunerwadel, the appellant, the mother of three minor girls, was permitted to intervene as a defendant and as representative of a class of Massachusetts parents having unmarried minor daughters, who are or might become pregnant.

This action was commenced on October 30, 1974, the day before Mass. G.L. c. 112, § 12S, was to take effect. On the following day, District Judge Frank H. Freedman issued a restraining order temporarily enjoining enforcement of the statute. After the three-judge court was convened, the hearing on the preliminary injunction was merged with the hearing on the merits. On April 28, 1975, after hearing several days of testimony, the court issued an opinion and

order declaring Mass. G.L. c. 112, § 12S, and other sections of chapter 112, insofar as they make specific reference thereto, unconstitutional, and permanently enjoined their enforcement. A vigorous and lengthy dissent was filed by Senior District Judge Anthony J. Julian. *Baird* v. *Bellotti*, 393 F. Supp. 847 (D. Mass. 1975) (*Baird I*).

Thereafter, the defendants, Francis X. Bellotti et al., and the defendant-intervenor, appellant herein, appealed to this Court. On July 1, 1976, this Court held that the statute was susceptible to an interpretation which "would avoid or substantially modify the federal constitutional challenge to the statute." *Bellotti* v. *Baird*, 428 U.S. at 148. The Court vacated the decision of the District Court on the ground that it "should have abstained pending construction of the statute by the Massachusetts courts," 428 U.S. at 146, and further held that "the District Court should have certified to the Supreme Judicial Court of Massachusetts appropriate questions concerning the meaning of [§ 12S] and the procedure it imposes." 428 U.S. at 151. On remand, the District Court denied plaintiffs' application for stay of enforcement pending certification of questions to the Supreme Judicial Court. However, on July 30, 1976, a single justice of this Court (Brennan, J.,) granted a stay of enforcement. The Court later denied appellant's application to vacate the stay. 429 U.S. 892 (1976).

On remand, plaintiffs filed an amended complaint and the District Court certified nine questions to the Supreme Judicial Court which are as follows:

> 1. What standards, if any, does the statute establish for a parent to apply when considering whether or not to grant consent?
>
> (a) Is the parent to consider "exclusively . . . what will serve the child's best interest"?

(b) If the parent is not limited to considering exclusively the minor's best interests, can the parent take into consideration the "long-term consequences to the family and her parents' marriage relationship"?

(c) Other?

2. What standard or standards is the Superior Court to apply?

(a) Is the Superior Court to disregard all parental objections that are not based exclusively on what would serve the minor's best interests?

(b) If the Superior Court finds that the minor is capable, and has, in fact, made and adhered to, an informed and reasonable decision to have an abortion, may the court refuse its consent based on a finding that a parent's, or its own, contrary decision is a better one?

(c) Other?

3. Does the Massachusetts law permit a minor (a) "capable of giving informed consent," or (b) "incapable of giving informed consent," "to obtain [a court] order without parental consultation"?

4. If the court answers any of question 3 in the affirmative, may the Superior Court, for good cause shown, enter an order authorizing an abortion (a) without prior notification to the parents, and (b) without subsequent notification?

5. Will the Supreme Judicial Court prescribe a set of procedures to implement c. 112, § 12S, which will expedite the application, hearing, and decision phases of the Superior Court proceeding provided thereunder? Appeal?

6. To what degree do the standards and procedures set forth in c. 112, § 12F (St. 1975, c. 564), authorizing minors to give consent to medical and dental care in specified circumstances, parallel the grounds and procedures for showing good cause under c. 112, § 12S?

7. May a minor, upon a showing of indigency, have court-appointed counsel?

8. Is it a defense to his criminal prosecution if a physician performs an abortion solely with the minor's own, valid consent, that he reasonably, and in good faith, though erroneously, believed that she was eighteen or more years old or had been married?

9. Will the court make any other comments about the statute which, in its opinion, might assist us in determining whether it infringes the United States Constitution?

On January 25, 1978, in *Baird* v. *Attorney General*, ____ Mass. ____, 360 N.E. 2d 288 (1977), the Supreme Judicial Court issued a comprehensive opinion answering all of the questions asked by the District Court. While not deciding the constitutional questions posed by the case, the court made every effort to interpret the statute in a manner consistent with the Constitution so as to give full effect to the announced legislative intent embodied in the title of the statute when it was initially enacted, i.e., "An Act to protect unborn children and maternal health within present constitutional limits." 360 N.E. 2d at 290; see Mass. St. 1974, c. 706, which added § 12S together with several other sections of the law. The Supreme Judicial Court also noted that the magnitude of the legislative intent was further enhanced by a broad savings clause in Mass. St. 1974, c. 706, § 2, which provides that "[i]f any section, subsection, sentence or clause of this act is held to be unconstitutional, such holding shall not affect the remaining portions of this act." 360 N.E. 2d at 291. Based upon this analysis, the Supreme Judicial Court prefaced its answers to the questions with the following statement:

> Our principal advice to the Federal District Court is that we would construe [§ 12S] to preserve as much of the expressed legislative purpose as is constitutionally permissible. The fact that the Supreme Court has not yet defined the permissible scope, if any, of parental involvement in an unmarried minor's decision to seek an abortion makes certain of our constructions of [§ 12S] potentially infirm. If the Supreme Court concludes that we have impermissibly assigned a greater role to the parents than we should or that we have otherwise burdened the minor's choice unconstitutionally, we add as a general principal that we would have construed the statute to conform to that interpretation. 360 N.E. 2d at 292.

After reviewing each question in detail, the Supreme Judicial Court summarized its answers to the nine questions as follows:

> Parental consultation is required in every instance where an unmarried minor seeks a nonemergency abortion. If the minor's parents (or their equivalent) are unavailable, parental consultation is not required. In deciding whether to consent to an abortion for their unmarried minor daughter, parents should consider only her best interests. If one or both parents refuse consent, a judge of the Superior Court may authorize an abortion for an unmarried minor if he rules that an abortion is in the minor's best interests. The parents, if available, must be notified of the court proceeding and must be allowed to participate in it. The judge in his discretion may appoint counsel or a guardian ad litem for the minor in the court proceeding. The court proceeding must be handled expeditiously. 360 N.E. 2d at 303.

Despite this interpretation of the statute, the District Court granted a further stay of enforcement of the statute pending another hearing on the merits. Again Senior District Court Judge Anthony J. Julian filed a vigorous dissent. See *Baird* v. *Bellotti*, 428 F. Supp. 854 (D. Mass. 1977) (*Baird II*). Thereafter, the plaintiffs and defendants engaged in lengthy discovery proceedings which included interrogatories, depositions and request for admissions of fact. In addition to the expert testimony and other evidence already part of the record in *Baird I*, the court heard additional evidence on October 17 and 18, 1977, at which time expert witnesses testified on behalf of the plaintiffs and defendants.

On May 2, 1978, the District Court issued the decision which is the subject matter of this appeal. *Baird* v. *Bellotti*, 450 F. Supp. 997 (D. Mass. 1978) (*Baird III*). Therein, a majority of the court held that § 12S was unconstitutional for basically two reasons. First, the majority felt that the statute was unconstitutional because it required parental consultation in all cases where an unmarried, minor girl sought an abortion. 450 F. Supp. at 1000-1003. Second, the majority felt that it was also unconstitutional insofar as it discriminated against so-called mature minor girls capable of giving an informed consent who under the statute could potentially be denied an abortion upon a finding by a Superior Court judge that an abortion would not be in their best interests. 450 F. Supp. at 1003-1004. This the majority felt was an "undue burden in the due process sense, and a discriminatory denial of equal protection." 450 F. Supp. at 1004. In reaching this decision, the majority rejected the Supreme Judicial Court's suggestion that the statute should be construed in a manner consistent with the Constitution. 450 F. Supp. at 1005-1006. Senior District Judge Anthony J. Julian again dissented. He felt that the requirement of parental consultation in all cases was proper. However, he agreed with the majority insofar as

it held that the statute was invalid because it discriminated against mature minors capable of giving an informed consent. 450 F. Supp. at 1015. But rather than voiding the entire statute, Judge Julian stated that he "would strike the provision for judicial override and would limit the judge's role to a determination of whether the minor is capable of making the decision and whether her decision to have an abortion is informed and reasonable." 450 F. Supp. at 1015.

The Question is Substantial.

As representative of a class of parents having unmarried minor girls of the child-bearing age, the intervenor strenuously contends that the District Court's decision is an unwarranted interference into the family unit. The decision is based upon the faulty presumption that parents will not act in the best interests of their minor children. It assumes that doctors rather than parents are better able to provide the love and emotional support a child requires in a time of need. The decision overlooks numerous decisions by this Court holding that parents have both the right and duty to guide and care for their minor children. See, e.g., *Meyer* v. *Nebraska*, 262 U.S. 390 (1923); *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925); *Prince* v. *Massachusetts*, 321 U.S. 158 (1944); *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972). For these reasons and those that follow, the intervenor contends that the question raised is substantial and deserves plenary consideration by this Court.

I. It Is Constitutionally Permissible To Require Minor, Unmarried Girls To Consult Their Parents Prior To Obtaining An Abortion.

The District Court held that § 12S is unconstitutional on its face because it requires parental consultation in all instances.

In so doing, it points to language by the Supreme Judicial Court that § 12S is "explicit in stating that a judge should pass on an application for a consent order only after one or both parents have declined to consent to the abortion." 450 F. Supp. at 1000, quoting *Baird* v. *Attorney General*, 360 N.E. 2d at 294. The doctrinal basis for the court's decision on this issue is unclear. It cites no constitutional provision or decisional law to support its finding. The court simply holds that parental consultation in all instances is unconstitutional.

The appellant contends that the District Court's decision contravenes the opinion of a majority of the justices of this Court as expressed in *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52 (1976), which was decided on the same day as the Court's earlier decision in this case. In *Danforth*, the issue before the Court was whether a statute requiring parental consent was constitutionally permissible. Unlike § 12S, the statute under consideration in *Danforth* had no provision for judicial review. In holding that such a statute was unconstitutional the Court stated:

> [T]he State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding the consent. 428 U.S. at 74.

Unlike the unbridled veto given parents in *Danforth*, the Massachusetts statute merely requires that minors consult with their parents. If a minor's parents refuse to consent to an abortion, consent may be obtained from a judge of the Superior Court "for good cause shown." In deciding whether to grant such consent, a judge may only consider the "best interests" of the child. See 360 N.E. 2d at 293.

The opinion of the Court in *Danforth* announced by Blackman, J., and joined by Marshall and Brennan, JJ., made it clear that the problem with the Missouri statute was that there was no provision for judicial review. As the Court stated:

> We emphasize that our holding that § 3(4) is invalid does not suggest that every minor, regardless of age or maturity, may give effective consent for termination of her pregnancy. See *Bellotti* v. *Baird*, [428 U.S. 132]. The fault with § 3(4) is that it imposes a special-consent provision, exercisable by a person other than the woman and her physician, as a prerequisite to a minor's termination of her pregnancy and does so without a sufficient justification for the restriction. 428 U.S. at 75. See also *Maher* v. *Roe*, 432 U.S. 464 (1977).

In a concurring opinion joined by Powell, J., Justice Stewart made it clear that a statute requiring parental consultation would be constitutionally permissible. He stated as follows:

> With respect to the state law's requirement of parental consent, § 3(4), I think it clear that its primary constitutional deficiency lies in its imposition of an absolute limitation on the minor's right to obtain an abortion. The Court's opinion today in *Bellotti* v. *Baird*, [428 U.S. 132, 147-148], suggests that a materially different constitutional issue would be presented under a provision requiring parental consent or consultation in most cases but providing for prompt (i) judicial resolution of any disagreement between the parent and the minor, or (ii) judicial determination that the minor is mature enough to give an informed consent without parental concurrence or that abortion in any event is in the minor's best

interest. Such a provision would not impose parental approval as an absolute condition upon the minor's right but would assure in most instances consultation between the parent and child.

There can be little doubt that the State furthers a constitutionally permissible end by encouraging an unmarried pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bear a child. That is a grave decision, and a girl of tender years, under emotional stress, may be ill-equipped to make it without mature advice and emotional support. It seems unlikely that she will obtain adequate counsel and support from the attending physician at an abortion clinic, where abortions for pregnant minors frequently take place. 428 U.S. at 90-91. (Footnotes omitted.)

The Chief Justice together with White and Rehnquist, JJ., disagreed with the majority and indicated that the parental consent provision contained in the Missouri statute was constitutional. In so doing, White, J., stated:

The abortion decision is unquestionably important and has irrevocable consequences whichever way it is made. Missouri is entitled to protect the minor unmarried woman from making the decision in a way which is not in her own best interests, and it seeks to achieve this goal by requiring parental consultation and consent. This is the traditional way by which States have sought to protect children from their own immature and improvident decisions; and there is absolutely no reason expressed by the majority why the State may not utilize that method here. 428 U.S. at 95.

Finally, Stevens, J., stated:

> A state legislature may conclude that most parents will be primarily interested in the welfare of their children, and further, that the imposition of a parental-consent requirement is an appropriate method of giving the parents an opportunity to foster that welfare by helping a pregnant distressed child to make and to implement a correct decision. 428 U.S. at 104.

In addition, the intervenor submits that the Massachusetts statute is expressive of a deeply rooted tradition favoring parental involvement in their children's decisions. In *Wisconsin* v. *Yoder*, 406 U.S. 205, 232 (1972), the Court stated: "The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of parents in the upbringing of their children is now established beyond debate as an enduring American tradition." See also *Meyer* v. *Nebraska*, 262 U.S. 390, 399 (1923); *Pierce* v. *Society of Sisters*, 268 U.S. 510, 534-535 (1925); *Prince* v. *Massachusetts*, 321 U.S. 158, 166 (1944); *Ginsberg* v. *New York*, 390 U.S. 629, 639 (1968); *Carey* v. *Population Services International*, 431 U.S. 678 (1977); *Moore* v. *East Cleveland*, 431 U.S. 494 (1977).

Finally, the intervenors contend that the District Court's decision amounts to no more than judicial superlegislation to a degree reminiscent of *Lochner* v. *New York*, 198 U.S. 45 (1905). Cf. Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L.J. 920 (1973); Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 Supreme Court Review 159; Loewy, *Abortive Reasons and Obscene Standards: A Comment on the Abortion and Obscenity Cases*, 52 North Carolina L. Rev. 223 (1973). The

District Court's entire decision is based upon the erroneous premise that parents will not act in the best interests of their minor children. Such a finding is not supported by the evidence nor is it supported by the common experience of mankind. The evidence presented in the District Court is sufficient to warrant a finding that the great and overwhelming majority of parents are supportive of their children and would act in their best interests. These are facts that the Massachusetts Legislature properly found and relied upon in enacting § 12S. That judgment should not be set aside.

II. The Statute Does Not Unconstitutionally Discriminate Against Mature Minor Girls Capable Of Giving An Informed Consent.

The only other reason advanced by the District Court for invalidating § 12S relates to mature minors capable of giving an informed consent. It found "no reasonable basis for Massachusetts distinguishing between a minor and an adult, given a finding of maturity and informed consent." 450 F. Supp. at 1004. The District Court found this to be an "undue burden in the due process sense, and a discriminatory denial of equal protection." 450 F. Supp. at 1004.

The point at issue here is the Supreme Judicial Court's answer to question 2(b) concerning the standard to be applied by the Superior Court in determining whether to give consent to an abortion. The Supreme Judicial Court stated as follows:

> Question 2(b) concerns what a judge must do in passing on the question whether the best interests of the minor will be served. Unless a contrary conclusion is compelled constitutionally, we do not view the judge's role as limited to a determination that the minor is

> capable of making, and has made, an informed and reasonable decision to have an abortion. Certainly the judge must make a determination of those circumstances, but, if the statutory role of the judge to determine the best interests of the minor is to be carried out, he must make a finding on the basis of all relevant views presented to him. We suspect that the judge will give great weight to the minor's determination, if informed and reasonable, but in circumstances where he determines that the best interests of the minor will not be served by an abortion, the judge's determination should prevail, assuming that his conclusion is supported by the evidence and adequate findings of fact. 360 N.E. 2d at 293.

The appellant contends that the "best interests of the minor" test propounded by the Supreme Judicial Court is constitutionally permissible. The mere fact that a minor girl may be capable of understanding the mechanics of a medical procedure such as a therapeutic abortion does not necessarily mean that the minor girl has the intellectual and emotional ability to make a decision which serves her long term best interests. As Justice Stevens stated, concurring in *Danforth*:

> In each individual case factors much more profound than a mere medical judgment may weigh heavily in the scales. The overriding consideration is that the right to make the choice be exercised as wisely as possible. 428 U.S. at 104.

Nevertheless, even if such a distinction was found to be constitutionally impermissible, the District Court was not justified in invalidating the entire statute. The Supreme

Judicial Court specifically stated that the statute be construed in such a manner as to render it constitutional. It stated:

> If the Supreme Court concludes that we have impermissibly assigned a greater role to the parents that we should or that we have otherwise burdened the minor's choice unconstitutionally, we add as a general principle that we would have construed the statute to conform to that interpretation. 360 N.E. 2d at 292.

The majority of District Court rejected this advice and declared the entire statute unconstitutional. Judge Julian in his dissenting opinion stated that he would not declare the entire statute unconstitutional but rather would strike out the provision in question and allow "a minor who is found by a judge to be capable of a reasonable and informed consent will be treated as an adult and allowed to exercise her right to an abortion." 450 F. Supp. at 1016.

Conclusion.

The subject matter of this appeal is a sensitive one. It involves fundamental relationships concerning the interaction of the state with parents and children. The Massachusetts Legislature recognized a problem and attempted to resolve it as delicately as possible. The Supreme Judicial Court has gone to great lengths to insure that § 12S is interpreted and applied in a constitutional manner. The question now for this Court to decide is whether this statute will be allowed to go into effect.

Close to four years have passed since this statute was first enacted by the Massachusetts Legislature. Yet, except for several days following the Court's earlier decision in this case, the statute has been under series of injunctions which have stayed its enforcement. The issues raised by the case are important and substantial. The resolution of these issues will have a national impact for legislatures seeking to enact legislation in this area. The case deserves plenary and expeditious consideration by the full Court. The appellants request that the Court note probable jurisdiction and schedule oral arguments at the soonest possible date so that the matter can be resolved by the end of the 1978 Term.

Respectfully submitted,

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Appendix.*

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

WILLIAM BAIRD; MARY MOE;
PARENTS AID SOCIETY, INC.;
GERALD ZUPNICK, M.D.; and all
others similarly situated,
Plaintiffs,

v.

FRANCIS X. BELLOTTI, Attorney General
of the Commonwealth of Massachusetts;
GARRETT BYRNE, District Attorney of the
County of Suffolk; the District Attorneys
for all other Counties, their agents, successors,
those acting in concert with them, and all others
similarly situated,
Defendants,

JANE HUNERWADEL,
Defendant-Intervenor.

CIVIL ACTION
No. 74-4992-F

Order.

In accordance with our opinion of May 2, 1978 Section S of Mass. G.L. c. 112, and such other portions of the chapter insofar as they make specific reference thereto are hereby

*See Note 1 and accompanying text on page 2, *ante*.

declared to be unconstitutional and void, and defendants are enjoined from enforcement thereof.

BAILEY ALDRICH,
U.S. Circuit Judge.

FRANK H. FREEDMAN,
U.S. District Judge.

May 2, 1978.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

WILLIAM BAIRD; MARY MOE;
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Defendants,

JANE HUNERWADEL,
Defendant-Intervenor.

CIVIL ACTION
No. 74-4992-F

Amended Order.

(Amending Order of May 2, 1978)

In accordance with our opinion of May 2, 1978, Section 12S of Mass. G.L. c. 112, and such other portions of the chapter insofar as they make specific reference thereto are hereby

declared to be unconstitutional and void, and defendants are enjoined from enforcement thereof.

BAILEY ALDRICH,
U.S. Circuit Judge.

FRANK H. FREEDMAN,
U.S. District Judge.

June 20, 1978

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

WILLIAM BAIRD, et al.,
Plaintiffs,

v.

FRANCIS X. BELLOTTI, et al.,
Defendants,

CIVIL ACTION
No. 74-4992-F

JANE HUNERWADEL,
Defendant-Intervenor.

Notice of Appeal to the Supreme Court of the United States.

Notice is hereby given that the defendant-intervenor, Jane Hunerwadel, on behalf of herself and all others similarly situated, hereby appeals to the Supreme Court of the United States from the final Amended Order entered on June 20, 1978, amending the order of May 2, 1978, declaring Mass. G.L. c. 112, sec. 12S, unconstitutional and void and enjoining enforcement thereof.

This appeal is taken pursuant to 28 U.S.C., sec. 1253.

Respectfully submitted,
JANE HUNERWADEL,
By her attorney,
BRIAN A. RILEY.

[CERTIFICATE OF SERVICE OMITTED IN PRINTING.]

FILED: JUNE 26, 1978